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No. 00-387

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 2000

GERBER PRODUCTS COMPANY,

Petitioner,

v.

PAMELA JEAN TYLKA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In their Brief in Opposition, respondents do not deny that they were and are in fact *citizens* of Illinois, as Gerber had alleged in its removal notices, and, therefore, that diversity jurisdiction actually existed at all relevant times. Indeed, respondents admitted their Illinois citizenship in both the district court and court of appeals. Rather, they try to defend the Seventh Circuit's ruling that Gerber's averment of this jurisdictional element did not satisfy the heightened standard of pleading the court erroneously applied.

Gerber had averred:

> "According to the allegations of the Complaint, Plaintiff is an individual who resides in Illinois. Thus, Plaintiff is a citizen of Illinois for jurisdictional purposes." (App. 62a).

Respondents strain to demonstrate that the reference to residence in *addition* to citizenship and the use of the word "thus" are of critical importance, distinguishing Gerber's averments from those allegations that this Court has previously upheld as sufficient. But respondents' efforts simply underscore Gerber's point that the Seventh Circuit, in concluding that these allegations of diverse "citizenship" were insufficient as a matter of federal pleading law, has elevated form over substance and unjustifiably adopted a heightened pleading requirement for removal notices. Respondents admit that the Seventh Circuit is applying this test in other cases.

Moreover, respondents offer little in response to our showing that this Court's decision in *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), required the Seventh Circuit to uphold the district court's judgment, even if the initial notices of removal were formally defective, so long as the record actually showed diversity of citizenship. They do not deny that the district court found as a fact that diversity existed. Respondents trivialize the *Caterpillar* interests in finality and judicial economy, suggesting that they do not apply because the Article III district

judge entered judgment in favor of Gerber on the merits, even though the Article I magistrate would have denied Gerber's motion for summary judgment. If ever there was a "non sequitur," that is it.

Finally, respondents' efforts to minimize the importance of this case are belied by the brief *amici curiae* filed on behalf of the U.S. Chamber of Commerce and the American Chemistry Council. That brief carefully and concretely explains the broad significance of the Seventh Circuit's decision for other litigants seeking to exercise their constitutional and statutory rights to remove cases to a federal forum, especially large "consumer class actions" filed against out-of-state corporate defendants. This case provides the Court with the opportunity to clarify the permissible scope of removal of class claims and the appropriate procedure for ascertaining and averring diversity jurisdiction.

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE COURT OF APPEALS.

Respondents contend that 28 U.S.C. § 1447(d) bars this Court from granting the petition, claiming that Congress made the Seventh Circuit's decision unreviewable. Respondents raised this same objection in opposing Gerber's application for a stay of the Seventh Circuit's mandate, contending that a stay would be inappropriate because this Court lacked jurisdiction to review the decision below. See Respondents' Opposition to Petitioner's Application for Stay at 6. Justice Stevens, however, granted the stay, implicitly rejecting that argument. Justice Stevens was undoubtedly correct in assuming that the Court possesses jurisdiction to grant certiorari.

This Court has repeatedly held that the statutory bar on appellate review of remand orders applies only to remand orders entered by the district court and does not apply to court of appeals rulings *reversing* the *denial* of a motion to remand.

Aetna Cas. & Surety Co. v. *Flowers*, 330 U.S. 464, 466-467 (1947); *Gay* v. *Ruff*, 292 U.S. 25, 30-31 (1934).

Respondents contend that Congress overruled *Flowers* and *Gay* in 1948 by altering the statute's original text — "no appeal or writ of error from the decision of the district court so remanding shall be allowed" — and substituting the current formulation: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise * * * ." As this Court has previously held, however, this change in language was not intended to have a substantive effect but rather was merely the by-product of Congress's recodification of the Judicial Code in 1948. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 349-350 & n.15 (1976) ("Sections 1447(c) and (d) represent the 1948 recodification of §§ 71 and 80. They were intended to *restate* the prior law with respect to remand orders and their reviewability.") (emphasis added).

Similarly, the authoritative commentators on federal jurisdiction agree that the change in language was not intended to divest this Court of its jurisdiction to review court of appeals decisions reversing the *denial* of motions to remand. See 16 MOORE'S FEDERAL PRACTICE 3D § 107App.113[2][a], at 107App.-198 (2000); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURIS 2D § 3740, at 549 (1998).

Not surprisingly, therefore, the decisions cited by respondents do not hold to the contrary. Indeed, every single decision cited by respondents involved *a district court* order *remanding* the case to state court. See *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 & n.2 (1995); *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723, 723 (1977) (*per curiam*). So too, *Volvo of America Corp.* v. *Schwarzer*, 429 U.S. 1331 (1976), a decision by then-Justice Rehnquist acting as Circuit Justice, presented the question whether to stay a decision by the *district court* remanding a suit to state court so

that the defendant could appeal *to the court of appeals*, but that is precisely the kind of order that Section 1447(d) does make non-reviewable.

In fact, in numerous cases since the statutory amendment this Court has reviewed decisions by the court of appeals remanding a case to state court. That includes a unanimous decision just four years ago. *E.g.*, *Caterpillar*, 519 U.S. at 66-67; *Willingham* v. *Morgan*, 395 U.S. 402, 404 (1969). In none of those cases did even one member of the Court suggest that § 1447(d) barred this Court's review. That consistent practice conclusively establishes jurisdiction here.

II. THE SEVENTH CIRCUIT'S DECISION THAT GERBER'S ORIGINAL NOTICES OF REMOVAL WERE DEFECTIVE WARRANTS REVIEW.

Respondents contend that the Seventh Circuit correctly decided that Gerber's notices of removal inadequately pled respondents' Illinois citizenship. According to respondents, Gerber's express allegation that "Plaintiff is a citizen of Illinois for jurisdictional purposes" was defective because it was preceded by and linked to an averment of their acknowledged Illinois residency. For that reason, respondents contend (at 10) that Gerber's allegation is "absolutely materially distinguishable" from the one this Court upheld in *Kinney* v. *Columbia Savings & Loan Ass'n*, 191 U.S. 78, 79 (1903), which read: "complainants herein are citizens and residents of Salt Lake City, state of Utah."

Far from showing why this Court should let the Seventh Circuit persist in its approach, respondents' arguments demonstrate the need for this Court's review. Gerber unambiguously alleged respondents' citizenship. (App 62a). The critical question (which respondents side-step and which this Court should resolve) is whether that allegation is sufficient when it is tied to the plaintiffs' own averment regarding their residence. Respondents cite no decision resolving that question

in their favor. Indeed, *Kinney*, the only decision of this Court they discuss in this regard, upheld the sufficiency of an allegation virtually identical to Gerber's. Moreover, respondents offer no response to our point that it is quite reasonable for a defendant sued by an individual to assume (and, therefore, to allege in a notice of removal) that the individual is a citizen of the State in which she resides.

Nor is there any merit to respondents' insistence that the Seventh Circuit did not adopt a heightened pleading requirement. The Seventh Circuit concluded that Gerber's allegation of respondents' Illinois ***citizenship*** was insufficient because it was tied to an allegation of respondents' Illinois ***residency***. That decision makes sense *if and only if* one believes (as the Seventh Circuit evidently does) that (1) the removal statute and the Federal Rules require a defendant to plead specific facts underlying its belief in the plaintiff's "citizenship;" and (2) it is unreasonable to infer, at the pleading stage, that a person's admitted residence is her domicile. That, of course, is nothing less than a heightened pleading requirement. Furthermore, as we explained in the Petition, each of these two predicates for the Seventh Circuit's approach in this case (and others cited in the Petition and in the U.S. Chamber of Commerce *amici* brief) flies directly in the face of the removal statute and Federal Civil Rule 8.

Lastly, respondents assert that there is no conflict among the circuits, because all of the circuits agree that an allegation of residency is insufficient for pleading purposes. Respondents, however, mischaracterize the question presented. No one disputes that citizenship, not residency, is the key to federal diversity jurisdiction. But the critical question here is whether an express allegation of citizenship premised upon the party's residence is insufficient. The Seventh Circuit stands alone among the circuits in holding that such an allegation fails to satisfy federal law and that federal law requires something more

than a bare allegation of citizenship.[1] Indeed, Respondents fail to identify even one decision from another circuit condemning an allegation similar to Gerber's.

III. THE SEVENTH CIRCUIT'S DECISION TO DISREGARD THE TRIAL COURT'S FINDING OF DIVERSE CITIZENSHIP AND TO REVERSE A JUDGMENT RENDERED ON THE MERITS AFTER FOUR YEARS OF LITIGATION JUSTIFIES SUMMARY REVERSAL.

In our Petition, we explained that the Seventh Circuit's decision conflicts directly with decisions of this Court and other circuits, which hold that a reviewing court cannot content itself simply with a survey of the pleadings but must also consider any evidence in the record bearing upon the existence of subject matter jurisdiction. In response, respondents argue (at 14-16) that (1) the Seventh Circuit invited Gerber to amend its notices of removal to conform to the evidence and (2) the evidence establishes only respondents' residence, not their citizenship.

Respondents' initial argument sails wide of the mark both factually and legally. The Seventh Circuit never ordered Gerber to do anything. Indeed, respondents conveniently side-step the salient fact that no written order was ever issued. True, at oral argument Judge Easterbrook questioned Gerber's counsel about

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[1] Respondents suggest (at 13) that the Seventh Circuit's decision does not conflict with *Lindros* v. *Fortuna*, 157 F.3d 945 (2d Cir. 1998), and *Taylor* v. *Appleton*, 30 F.3d 1365 (11th Cir. 1994). They ignore the fact that those circuits, along with *Lew* v. *Moss*, 797 F.2d 747, 748 (9th Cir. 1986),which we also cited for illustration, endorsed as sufficient for pleading purposes allegations of citizenship far more conclusory than Gerber's. See *Lindros*, 157 F.3d at 946 (plaintiff "is a citizen of the State of Florida"); *Taylor*, 30 F.3d at 1367 ("Taylor's complaint alleges that he is a citizen of Florida * * * .").

the removal notices, but even he did not expressly direct Gerber to file an amended notice. It would be highly undesirable to establish a rule that places upon parties the burden to amend pleadings whenever one member of a panel questions counsel at oral argument about a possible defect in the pleadings.

More fundamentally, respondent's argument misses the point as a legal matter. Gerber was under no obligation to file amended notices of removal in the first place. As we explained, Rule 15(b) required the Seventh Circuit to treat the original notices of removal as conformed to the evidence presented. As this Court insisted in *Caterpillar*, a reviewing court cannot dismiss for lack of jurisdiction because of a pleading defect, if the evidentiary record actually reveals the existence of the jurisdictional facts. Thus, to require Gerber to amend the removal notices when the case was already at the appellate level would have been both a pointless formality and a waste of time and money – which is ***precisely*** why this Court, every other court of appeals, and Rule 15(b) dispense with such a requirement.

Respondents' alternative argument is that the evidence did not establish their citizenship. This is a gross distortion of the record. Respondents neglect to mention the district court's express finding that the parties are of diverse citizenship (App. 18a). They also ignore their own explicit concession in their Seventh Circuit brief that they are Illinois citizens. Moreover, respondents conceded in their deposition testimony and interrogatory answers that they resided in Illinois at the time they brought suit, that they had lived there for many years before that, and that some of them had been born in Illinois and had never resided outside the state. In the absence of any evidence that their *domicile* was different from their residence – and respondents offered none – that evidence was sufficient as a matter of law to establish that respondents were citizens of Illinois, as the district court found. *E.g.*, *Gutierrez* v. *Fox*, 141 F.3d 425, 428-429 (2d Cir. 1998) (evidence that plaintiff resides

in New Jersey sufficient to establish his New Jersey citizenship for diversity purposes). Indeed, even now, respondents do not contend otherwise.

Most importantly, respondents fail to come to grips with this Court's decision in *Caterpillar*, which foreclosed the Seventh Circuit from vacating a judgment rendered on the merits after four years of litigation because of a mere pleading error in the original notices of removal. Respondents contend (at 16-20) that, despite *Caterpillar*, the Seventh Circuit was empowered to reverse the judgment in Gerber's favor as a sanction for Gerber's (alleged) failure to comply with the Court's directive to file an amended notice of removal pursuant to 28 U.S.C. § 1653. As noted above, however, Gerber did not disregard any express direction by the court of appeals. Moreover, the Seventh Circuit did not try to justify its decision as a "sanction" for failing to comply with some kind of directive to amend the notices. Rather, the court rested its decision on its patently erroneous belief that (1) the notices were defective and (2) the alleged pleading defect allowed the court to ignore the actual existence of diversity as shown by the record.

Moreover, Respondents misapprehend the purpose of Section 1653. That provision is not a sword designed to penalize litigants for failing to correct deficient pleadings; rather, it is a shield whose avowed purpose is to avoid the precise result that occurred here. Indeed, in light of this Court's decision in *Caterpillar*, reversal and remand to the state courts for relitigation would not be a permissible sanction for a mere pleading error in the original notice of removal.

So too, there is no merit in respondents's related argument (at 22-23) that *Caterpillar* does not apply here, because subject matter jurisdiction was lacking at the time the district court entered judgment. As noted above, the district court expressly found that the parties were diverse, and the respondents

themselves conceded this fact in their brief to the Seventh Circuit. Thus, not only did subject matter jurisdiction exist when judgment was entered, it has always existed in this case.

IV. THIS COURT SHOULD RESOLVE THE SUPPLEMENTAL JURISDICTION ISSUE LEFT OPEN LAST TERM IN *FREE* v. *ABBOTT LABORATORIES, INC.*, 529 U.S. ___ (2000).

Respondents acknowledge that the effect of the recent "supplemental jurisdiction" statute on this Court's decision in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), is a cert-worthy issue and that the Court sought to decide it last Term in *Free*. They also admit (at 24) that the "*Zahn* issue" is "in this case." Indeed, it was the principal focus of respondents' appeal to the Seventh Circuit. Respondents even suggest (at 27) that, if the Court grants certiorari, they should be viewed as "the true 'petitioner'" on this issue.

Nevertheless, they contend (at 26) that this case is a poor vehicle in which to resolve the issue. They argue that, using what they believe are the correct legal inquiries, *none* of the named plaintiffs asserted a claim worth more than $50,000. The district court, however, resolved that preliminary question against them, concluding that, in calculating the jurisdictional amount "in controversy," the court could consider the defendant's cost of complying with injunctive relief sought as well as its potential liability for attorneys fees. The court also determined that the cost of the injunctive relief, which approximated $1 million, could be attributed to any one of the named plaintiffs and that, therefore, there was at least one plaintiff whose claim satisfied the jurisdictional minimum. (App. 17a).

The district court's conclusions on these points are sound. But in any event, these issues are inextricably bound up with *Zahn* and the supplemental jurisdiction issue. These subsidiary issues about what factors may be considered in calculating the

jurisdictional amount are part of the existing circuit conflict. Thus, their resolution is subsumed within the questions presented by the Petition.

Respondents also contend (at 24-25) that the "*Zahn* issue" is not ripe for review, because the Seventh Circuit did not expressly address it in the decision below. But the issue is nevertheless "ripe" in this case, because it is essential to the validity of the judgment against respondents and was expressly litigated below. Moreover, as we explained in the Petition, there is nothing to be gained by deferring the resolution of this legal issue so as to permit the Seventh Circuit to address it expressly in this case. In an earlier decision, the Seventh Circuit already aligned itself with the Fifth Circuit and concluded that Congress's passage of 28 U.S.C. § 1367 did overrule this Court's decision in *Zahn*. See *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 930-931 (7th Cir. 1996). The district court's judgment rests on that approach.

Finally, it is important to the administration of civil justice throughout the country that this Court resolve the issue as soon as possible. The *Zahn* issue continues to divide the lower courts. See, *e.g.*, *Morrison* v. *Allstate Indem. Co.*, ___ F.3d ___, 2000 WL 1392456, at *18 (11th Cir. Sept. 26, 2000) (noting the continuing circuit split on this issue and remanding to district court for further proceedings). Moreover, this case presents the first-available opportunity to resolve the matter. Indeed, if the Court declines to consider this issue now in this case, it may not be able to address this issue later on as part of an appeal from a final judgment of the Illinois Supreme Court, and no other case appears ready for this Court's review. Thus, along with the diversity/removal issue, this supplemental jurisdiction issue is squarely framed and obviously important.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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